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IN THE

Supreme Court of the United States

October Term, 1940

No. 965

FRANK L. KLOEB, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION,

Petitioner and Respondent Below,

vs.

ARMOUR & COMPANY, AN ILLINOIS CORPORATION,

Respondent and Petitioner Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PERCY R. TAYLOR,
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SUBJECT INDEX

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To the Honorable Charles Evans Hughes,
Chief Justice of the United States, and the
Associate Justices of the Supreme Court
of the United States:
Your petitioner respectfully shows:

I

SUMMARY STATEMENT OF THE MATTER INVOLVED

This was a suit originally filed, on leave first obtained, in the United States Circuit Court of Appeals for the Sixth Circuit, being No. 8355, Original, on the docket of said court, under the following title:

> "In the matter of the application of Armour & Company, an Illinois corporation, for a writ of mandamus against the Honorable Frank L. Kloeb, Judge of the District Court of the United States for the Northern District of Ohio, Western Division, and against said District Court." (Record, p. 1.)

The certified transcript of record, filed herewith, shows that the case was decided upon the allegations of the petition and exhibits attached thereto and made a part thereof, and the reply of your petitioner. Said certified transcript is hereinafter referred to as the record. (Record, pp. 61, 66, 71.)

In paragraph one of said petition, the petitioner alleged that at all times prior to May 28, 1938, it was a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and maintained an office and place of business in the City of Toledo, Ohio, engaging in the business of selling at wholesale fresh meat and meat products; that as of May 28, 1938, said Kentucky corporation was liquidated and its assets transferred to its sole stockholder, the petitioner, Armour & Company, an Illinois corporation, which assumed the debts and obligations of the Kentucky corporation, and

has continued to maintain said office and place of business and engage in said business in said City of Toledo. (Record, p. 2.)

In said petition said Armour & Company, an Illinois corporation, respondent herein, further alleged that on certain dates, therein stated, between February 1, 1935, and March 2, 1935, five separate petitions, in all material respects identical, were filed by five separate plaintiffs against petitioner, Armour & Company, and Charles J. Burmeister, as defendants, to recover various sums of money as damages for each of the plaintiffs aforesaid because of each of said plaintiffs having contracted the disease known as trichinosis from a pork product known as Boston butts, infected with said disease, sold by Armour & Company to the defendant Burmeister and by Burmeister manufactured into a smoked sausage known as metwurst and sold to one of plaintiffs and partaken of by all of them, in violation of the Pure Food Laws of the State of Ohio, particularly Sections 5774, 5775, 5778 and 12760 of the General Code of Ohio, the full text of which is set forth on pages 18 and 19 of the brief filed herewith.

Said allegations appear in paragraph 2 of said petition (Record, pp. 2 and 3) and Exhibit A, made a part thereof. (Record, p. 10.)

Said petition further stated that Armour & Company seasonably filed a petition and bond, a notice and motion thereof and motion therefor in each of said cases for removal of the same to the District Court of the United States for the Northern District of Ohio, Western Division; that the Court of Common Pleas of Lucas County, Ohio, on hearing, denied each of said petitions; that on March 10, 1936, petitioner filed in each of said cases an

identical motion to reconsider the petition for removal, which motions were denied by said Court of Common Pleas on March 14, 1936, as appears by its journal entries. (Record, pp. 13-19, inclusive.)

Said petition for mandamus then recited that the case of *George E. Kniess vs. Armour & Company and Burmeister* proceeded to trial, the other four cases remaining pending; that on November 30, 1938, the Supreme Court of Ohio rendered its decision in the *Kniess* case in which the judgments of the courts below were reversed on the ground that the petition of Kniess showed that a separable controversy existed and that under ordinary circumstances, in such an action, the liability of the packer is primary and that of the retailer is secondary, so that they cannot be joined as joint tort-feasors. Therefore, the Supreme Court of Ohio remanded the case to the Court of Common Pleas of Lucas County, Ohio, with instructions to grant the petition to remove said cause to the District Court of the United States. (Record, pp. 3-5, inclusive.)

Thereafter, as alleged in said petition, the petitions for removal to the District Court of the United States in each of said five cases were granted by said Court of Common Pleas on February 10, 1939, and said causes were removed to said District Court and there docketed on February 17, 1939. (Record, pp. 5, 6.)

On February 22, 1939, the plaintiff in each of said causes filed an amended complaint in the District Court, these being in all material respects identical. This was pursuant to an identical stipulation filed in each of said causes. (Record, p. 6 and p. 23.)

Thereafter, on March 3, 1939, plaintiff, George E.

Kniess, filed a motion to remand said cause, together with two affidavits in support thereof. One of these affidavits recited that said Kniess was not then and had not at any time been a citizen of the United States or of any state thereof, but was still an alien citizen or subject of Germany, in that he had not yet received his final naturalization papers, and that these facts had been unknown to his counsel until within less than a week preceding the filing of said motion to remand. (Record, pp. 6 and 24, 25.)

The second affidavit set forth the exact language of the defendant Burmeister in testifying under cross examination on the second trial of the *Kniess* case, in which for the first time it was learned by plaintiff and his counsel that Armour & Company knew, when it sold the Boston butts to Burmeister out of which the latter made the metwurst from which plaintiff acquired trichinosis, that Burmeister purchased these Boston butts for the express purpose of making this metwurst, and that Armour & Company solicited the order so that Burmeister might make this smoked sausage. (Record, pp. 27-30.) No claim is made by Armour & Company that it denies the truth of or even objected to this evidence.

On March 6, 1939, each of the other four plaintiffs filed an identical motion to remand said cause, together with an affidavit identical in all material respects with the second affidavit filed by Kniess. (Record, pp. 30, 31.)

On March 16, 1939, Armour & Company filed a motion in said District Court, in the *Kniess* case, to amend its petition for removal so as to show that Kniess was a citizen and subject of Germany. (Record, p. 6.)

On April 1, 1939, your present petitioner, as judge

of said District Court, entered an order in each of said five cases sustaining the motion to remand, without opinion. (Record, pp. 7 and 34.)

On April 22, 1939, Armour & Company filed in each of said cases a motion to vacate and set aside said order of remand, which motions were overruled, without opinion, on June 22, 1939. (Record, pp. 7 and 36.)

On the foregoing state of facts Armour & Company claimed in its petition for writ of mandamus that your present petitioner was required by Title 28, Section 687, United States Code, to give full faith and credit to the decisions of the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio, that a separable controversy existed in each of said causes; that the question of separable controversy was then *res adjudicata* and that your petitioner transcended his power in ordering said respective remands. (Record, p. 8.)

The petition therefore prayed that a writ of mandamus issue requiring your petitioner to vacate said orders of remand and to reinstate said causes on the docket of said District Court, and to grant Armour & Company's motion to amend its petition for removal in the *Kniess* case.

To this petition your petitioner filed a reply raising the following issues:

1. Denying the jurisdiction of said United States Circuit Court of Appeals to issue a writ of mandamus requiring your petitioner to vacate his former orders of remand in said five cases, because said orders of remand were final orders from which no appeal may be allowed, pursuant to the provisions of Title 28, Section 71, United States Code, and said attempted review by mandamus

of such an order has been expressly forbidden by this court in *Employers Reinsurance Corporation vs. Bryant, Judge,* 299 U. S. 374. (Record, pp. 61 and 62.)

2. That said Circuit Court of Appeals is likewise without jurisdiction to entertain said suit or issue said writ of mandamus because its power to issue said writ is limited by the provisions of Title 28, Section 377, United States Code, to cases in which it has appellate jurisdiction, and in aid of such jurisdiction, and said court has no such appellate jurisdiction as to an order of remand. (Record, p. 62.)

3. That as stated by this court in *United States on the relation of Alaska Smokeless Coal Company vs. Lane, Secretary of the Interior,* 250 U. S. 549, on page 555, the writ of mandamus will not issue to control or direct the exercise of discretionary powers such as were here involved. (Record, p. 62.)

4. That undisputed affidavits filed in support of the motions to remand, showed for the first time both that the plaintiff Kniess was not a citizen of the State of Ohio, nor of any other state, nor of the United States, but was and is an alien; and also that Armour & Company had full knowledge, at the time it sold the pork product known as Boston butts to defendant Charles J. Burmeister, that Burmeister intended to and would make metwurst therefrom, the eating of which metwurst made from diseased pork products so sold by Armour & Company caused each of said plaintiffs to contract the disease known as trichinosis. (Record, p. 63.)

5. That the opinion of the Supreme Court of Ohio in *Kniess vs. Armour & Company,* 134 O. S. 432, expressly stated that the question whether said cause contained a

separable controversy must be adjudicated solely upon an examination of the allegations contained in the petition of the plaintiff, and that unfortunately it could not give any consideration, upon this question of removal, to the evidence adduced on the trial, which was the subject of the affidavits filed with said five motions to remand, hereinbefore referred to. (Record, p. 64.)

But your petitioner stated that pursuant to the direction and requirement of Title 28, Section 80, United States Code, and of the order and rule laid down by this court in *McNutt vs. General Motors Acceptance Corporation of Indiana, Inc.*, 298 U. S. 178, he, as judge of the District Court of the United States, was not bound by the pleadings of the parties, but was required to inquire into the facts of each of said cases, to ascertain if a separable controversy actually existed, and in so doing to consider the facts shown in all of said affidavits; and having done so and further considering that plaintiff Kniess was an alien, your petitioner made and caused to be entered said orders of remand to the Court of Common Pleas of Lucas County, Ohio, upon the said grounds not considered or determined by the Supreme Court of Ohio or said Court of Common Pleas, as well as other grounds later referred to. (Record, p. 64.)

6. That the several petitions for removal of said five causes filed in the Court of Common Pleas of Lucas County, Ohio, were defective in that they did not allege that the ground for removal was because of the existence of a separable controversy between the respective plaintiffs and Armour & Company, but left it to be inferred that the ground for removal was diversity of citizenship, which was the only fact pleaded. (Record, p. 64.)

7. As to the claim of estoppel made in paragraph 27 of the petition of Armour & Company, your petitioner stated that any such alleged estoppel did not bind the District Court of the United States nor your petitioner as judge thereof. (Record, p. 65.)

8. That by making an entry in said orders of remand, your petitioner, as judge, and the District Court of the United States, ceased to have any jurisdiction to consider any further motions on the part of Armour & Company. (Record, p. 65.)

The aforesaid reply was filed on or about October 27, 1939.

On December 5, 1939, said Circuit Court of the United States filed an opinion, without any hearing, briefs or arguments, in which said court expressed the view that your petitioner should vacate all of said orders of remand and resume jurisdiction of said cases, because of the obligation to give full faith and credit to the decisions of the state courts, Supreme and Common Pleas, holding that a separable controversy existed in each of said cases, but no mandate was then issued. (Record, pp. 66-70, inclusive.)

As your petitioner felt it improper to comply with the suggestions of said Circuit Court of Appeals, that court on March 12, 1940, filed a second opinion in said cause and ordered that a mandate issue to your petitioner, which was forthwith done, and said judgment of said Circuit Court of Appeals entered as of that date. (Record, p. 71.)

II

THE BASIS FOR THE JURISDICTION OF THIS COURT TO REVIEW THE JUDGMENT IN QUESTION

1. The statutory provision which is believed to sustain the jurisdiction of this court is Judicial Code, Section 240(2), as last amended by the Act of Congress, approved June 7, 1934, C. 426, 48 Stat. 926. (Title 28, Sec. 347(a) U. S. C. A.)

2. The cases believed to sustain the jurisdiction of this court are as follows:

Employers Reinsurance Corporation vs. Bryant, Judge, 299 U. S. 374.
Gay vs. Ruff, 292 U. S. 25.
Forsyth vs. Hammond, 166 U. S. 506.

III

QUESTIONS PRESENTED

The following questions are presented for the consideration of this court:

1. Whether the United States Circuit Court of Appeals for the Sixth Circuit had jurisdiction to order your petitioner, by writ of mandamus, to vacate orders made by him remanding five cases to the state court from which they had been removed.

2. Whether your petitioner, after entering orders remanding these five cases to the state court, can regain jurisdiction of said cases by vacating the orders of remand, in obedience to a writ of mandamus.

3. Whether the decision of the Supreme Court of Ohio in the case of *Kniess vs. Armour & Company et al.*, 134 O. S. 432, 17 N. E. (2d) 734 (1938), which held that upon the allegations of the petition a separable controversy existed, foreclosed your petitioner from considering undisputed facts not appearing in said petition which would require the remand of said cause and the other four identical causes to the state court under Section 37 of the Judicial Code, 28 U. S. C. A., Section 80.

4. Whether your petitioner was bound to retain jurisdiction of the case of *George Kniess vs. Armour & Company et al.*, after it appeared that George Kniess, the plaintiff, was an alien, merely because the Supreme Court of Ohio had previously held that upon the allegations of the original petition a separable controversy existed.

5. Whether the petitions for removal of said five cases were sufficient to justify removal on the ground of separable controversy when they merely alleged that one of the defendants was a non-resident of the state in which the suit was brought.

IV

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The issuance, by the Circuit Court of Appeals for the Sixth Circuit, of a writ of mandamus ordering the vacation of orders of remand made by your petitioner is in conflict with the unanimous holdings of this court. In so doing, said Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

2. There is no method by which your petitioner can carry out the mandate of the Circuit Court of Appeals and regain jurisdiction of these cases. The rule has always been that the vacation of an order of remand does not have that effect.

3. The decision of said Circuit Court of Appeals holding that the decision of the Supreme Court of Ohio, which was based on the petitions alone, finding a separable controversy to exist warranting the removal of said five cases, foreclosed your petitioner from remanding said cases when it later appeared that in fact there was no basis for federal jurisdiction, limits the rights and duties of your petitioner under Section 37 of the Judicial Code, 28 U. S. C. A., Section 80.

4. The decision of the Circuit Court of Appeals prohibiting your petitioner from remanding the case of *Kniess vs. Armour & Company et al.*, removed on the ground that a separable controversy existed, when it appeared that Kniess was an alien, is contrary to the decisions of this court and Section 37 of the Judicial Code, 28 U. S. C. A., Section 80.

5. The Circuit Court of Appeals erred in holding that a petition for removal, alleging diversity of citizenship as the only ground for removal, was sufficient to warrant a removal on the ground that a separable controversy existed.

Wherefore, your petitioner prays that a writ of *certiorari* issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Ap-

peals had in the case numbered and entitled on its docket, No. 8355, original, In the matter of the application of Armour & Company, an Illinois corporation, for a writ of mandamus against the the Honorable Frank L. Kloeb, Judge of the District Court of the United States for the Northern District of Ohio, Western Division, and against said District Court, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals be reversed by this court, and for such further relief as to this court may seem proper.

PERCY R. TAYLOR,
NOLAN BOGGS,
Counsel for Petitioner.

Dated May 3, 1940.

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IN THE
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October Term, 1939

No.....

FRANK L. KLOEB, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION,
Petitioner and Respondent Below,

vs.

ARMOUR & COMPANY, AN ILLINOIS CORPORATION,
Respondent and Petitioner Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINIONS BELOW

The first opinion in the Circuit Court of Appeals for the Sixth District was filed on December 5, 1939, and appears in the record, page 66 *et seq.* It is reported in 109 Fed. (2d) 72.

The second opinion of said court has not been reported, but was rendered on March 12, 1940, and is found at page 71 of the record.

II

JURISDICTION

1. The date of the judgment to be reviewed is March 12, 1940. (Record, p. 71.)

2. The statutory provision which is believed to sustain the jurisdiction of this court is Judicial Code, Section 240(2), as last amended by the Act of Congress, approved June 7, 1934, C. 426, 48 Stat. 926. (Title 28, Sec. 347(a) U. S. C. A.)

3. This case is one in which the United States Circuit Court of Appeals for the Sixth Circuit, in an original action brought in that court by Armour & Company, respondent herein, issued its writ of mandamus to your petitioner, ordering him as judge of the District Court of the United States for the Northern District of Ohio, Western Division, to vacate certain orders theretofore made by him, remanding five similar cases to the Court of Common Pleas of Lucas County, Ohio, from which the said five cases had been removed to said District Court. (Record, p. 71.)

4. The cases believed to sustain the jurisdiction of this court are as follows:

Employers Reinsurance Corporation vs. Bryant, Judge, 299 U. S. 374.
Gay vs. Ruff, 292 U. S. 25.
Forsyth vs. Hammond, 166 U. S. 506.

III

STATEMENT OF THE CASE

This has already been stated in the preceding petition under Heading I (pages 2 to 9), which is hereby adopted and made a part of this brief.

To this may be added the further statement that trichinosis is a disease caused from parasites known as trichinae which infect only swine, and such infection occurs solely in such swine through their eating matter containing such parasites, which parasites thereafter lodge in the flesh of the swine before the animal is slaughtered. The only way in which human beings can contract this disease, therefore, is by eating pork from swine so infected. There is no known cure for the disease. (Exhibit A attached to and made a part of petition of Armour & Company, found in Record, page 10 *et seq.*)

Armour & Company sold a quantity of a pork product known as Boston butts, some part of which were infected with these trichinae, from its local establishment in the City of Toledo, to a retail butcher in Toledo named Charles J. Burmeister, who manufactured therefrom a smoked sausage known as metwurst and offered the same for sale. This was in the month of October, 1934. All five of the plaintiffs in the cases referred to in the petition of Armour & Company partook of this metwurst and all contracted the disease of trichinosis therefrom. They brought their respective suits against Armour & Company and Burmeister, joined as defendants in each, to recover damages. (Record, pp. 2, 3.)

The basis of recovery in each of these cases was violation of the Pure Food Laws of the State of Ohio, particularly Sections 5774, 5775, 5778 and 12760 of the General Code of Ohio, which are as follows:

"Sec. 5774. Adulterated and misbranded drugs or food. No person, within this state, shall manufacture for sale, offer for sale, sell or deliver, or have in his possession with intent to sell or deliver, a drug or article of food which is adulterated within the meaning of this chapter, or offer for sale, sell or deliver, or have in his possession with intent to sell or deliver, a drug or article of food which is misbranded within the meaning of this chapter."

"Sec. 5775. Definition of the terms 'drug,' 'food' and 'flavoring extract.' The term 'drug,' as used in this chapter, includes all medicines for internal or external use or inhalation, antiseptics, disinfectants and cosmetics. The term 'food,' as used in this chapter, includes all articles used by man for food, drink, flavoring extract, confectionery, or condiment, whether simple, mixed or compound. The term 'flavoring extract,' as used in this chapter, includes all articles used as a flavor for foods or drinks, whether used or sold as an extract, flavor, essence, tincture or by another name."

"Sec. 5778. Adulterated food, drink, confectionery or condiment; definition. Food, drink, confectionery or condiments are adulterated within the meaning of this chapter (1) if any substance or substances have been mixed with it, so as to lower or depreciate or injuriously affect its quality, strength or purity; (2) if any inferior or cheaper substance or substances have been substituted wholly, or in part; (3) if any valuable or necessary constituent or ingredient has been wholly, or in part, abstracted from it; (4) if it is an imitation of, or is sold under the name of another article; (5) if it consists wholly, or in part,

of a diseased, decomposed, putrid, infected, tainted or rotten animal or vegetable substance or article, whether manufactured or not or in the case of milk, if it is the product of a diseased animal; (6) if it is colored, coated, polished or powdered, whereby damage or inferiority is concealed, or if by any means it is made to appear better or of greater value than it really is; (7) if it contains any added substance or ingredient which is poisonous or injurious to health; (8) if, when sold under or by a name recognized in the eleventh decennial revision of the United States pharmacopoeia, or the sixth edition of the national formulary, it differs from the standard of strength, quality or purity laid down therein; (9) if, when sold under or by a name not recognized in the eleventh decennial revision of the United States pharmacopoeia, or the sixth edition of the national formulary, but if found in some other pharmacopoeia, or other standard work on *materia medica*, it differs materially from the standard of strength, quality or purity, laid down in such work; (10) if the strength, quality or purity falls below the professed standard under which it is sold; (11) if it contains any methyl or wood alcohol."

"Sec. 12760. Selling, etc., unwholesome provisions. Whoever sells, offers for sale or has in possession with intent to sell, diseased, corrupted, adulterated or unwholesome provisions without making the condition thereof known to the buyer, shall be fined not more than fifty dollars or imprisoned twenty days, or both."

IV

SPECIFICATION OF ERRORS

1. Said Circuit Court of Appeals erred in holding that it had jurisdiction to order your petitioner, by writ of mandamus, to vacate orders made by him remanding

five cases to the state court from which they had been removed.

2. Said Circuit Court of Appeals erred in ordering your petitioner to do something beyond his power to perform, that is, retake jurisdiction of these cases by vacating his orders of remand. The rule has always been that the vacation of an order of remand does not reinvest jurisdiction in the federal court.

3. Said Circuit Court of Appeals erred in holding that the decision of the Supreme Court of Ohio in *Kniess vs. Armour & Co.*, 134 O. S. 432, holding that upon the allegations of the petition alone a separable controversy existed, foreclosed as *res judicata* your petitioner from considering undisputed facts properly brought to his attention, which did not appear in the petition, and which facts would require the remand of these five cases under Section 37 of the Judicial Code, 28 U. S. C. A., Section 80.

4. Said Circuit Court of Appeals erred in holding that your petitioner was bound to retain jurisdiction of the case of *Kniess vs. Armour & Company,* after it appeared that Kniess was an alien, merely because the Supreme Court of Ohio had previously held that upon the allegations of the petition a separable controversy existed.

5. Said Circuit Court of Appeals erred in holding that the petitions for the removal of these five cases were sufficient to justify removal on the ground of separable controversy, although they merely alleged that one of the defendants was a non-resident of the state in which the suit was brought.

V

ARGUMENT

Point A. Mandamus Will Not Lie to Vacate an Order of Remand

The applicable part of Section 28 of the Judicial Code as amended by the Act of Congress of August 13, 1888, c. 868 (28 U. S. C. A., Sec. 71), reads as follows:

> "Whenever any cause shall be removed from any state court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal from the decision of the district court so remanding such cause shall be allowed."

In an unbroken line of decisions for the last fifty years or more, this court has held that the above quoted language of the statute has also taken away any remedy by mandamus. The two leading cases so holding are *Employers Reinsurance Corporation vs. Bryant*, 299 U. S. 374, 380 (1937), and *Re Pennsylvania Company*, 137 U. S. 451. In the former case, Mr. Justice VanDevanter stated (pages 380-381):

> "The provisions in the Act of 1887 * * * are still in force as parts of Sections 71 and 80, 28 U. S. C. A. They are in *pari materia*, are to be construed accordingly rather than as distinct enactments, and when so construed show, as was held in *Morey vs. Lockhart*, 123 U. S. 56, 58, 31 L. Ed. 68, 69, 8 S. Ct. 65, that they are intended to reach and include all cases removed from a state court into a federal court and remanded by the latter.

> "It follows that the remanding order of the District Court was not subject to re-examination by the Circuit Court of Appeals on the petition for mandamus."

Therefore, it is respectfully submitted that the issuance of this writ of mandamus to vacate a final order of remand in the five cases referred to is in conflict with the above applicable decisions of this court, and is so far a departure from the accepted and usual course of judicial proceedings under the aforesaid rulings of this court and of the provisions of the Judicial Code above cited as to call for an exercise of this court's power of supervision.

Point B. Petitioner Cannot Regain Jurisdiction of These Cases by Vacating the Orders of Remand

It has generally been held that a federal district judge is without authority to vacate a remanding order even during the same term. The remanding order reinvests the state court with jurisdiction and terminates the federal court's jurisdiction. *Ausbrooks vs. Western Union Telegraph Co.*, (D. C., Tenn., 1921) 282 F. 733, opinion written by Judge Sanford who later became a Justice of the United States Supreme Court. See also *Ex parte Lange,* 18 Wall. 163, 178, and *Empire Mining Co. vs. Propeller Towboat Co.*, (C. C., S. C., 1901) 108 F. 900; *Chisolm vs. Propeller Towboat Co. of Savannah,* 59 S. C. 549.

We submit, therefore, that it is impossible for your petitioner to carry out the mandate of the Circuit Court of Appeals. He cannot regain jurisdiction of these cases by vacating the orders of remand.

Point C. The Decision of the Supreme Court of Ohio Is Res Judicata Only as to the Existence of a Separable Controversy as Shown by Plaintiff's Petition, But Does Not Prohibit Your Petitioner from Considering Undisputed Facts, Not Appearing in Said Petition, Which Would Require Remand Under Section 37 of the Judicial Code, 28 U. S. C. A., Section 80.

The sole basis for the issuance of the writ of mandamus in this case was that the decision of the Supreme Court of Ohio in *Kniess vs. Armour & Co.*, 134 O. S. 432, was final and *res judicata* of the question of federal jurisdiction, so that the federal district judge could not take cognizance of the actual facts and remand the cases under Section 37 of the Judicial Code. This is readily seen from the following quotation from the opinion of the Circuit Court of Appeals, 109 F. (2d) 72, at 75:

> "To hold otherwise would be to permit the District Court to defy the statute 28 U. S. C. A., Sec. 687, which provides: 'The records and judicial proceedings of the courts of any state * * * shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken'." (Record, p. 69.)

The Circuit Court of Appeals stated in its opinion that the precise question here treated is one of first impression. If this is true, it is respectfully submitted that this presents a federal question of great importance, which we believe this court should decide.

But it is the understanding of your petitioner that this is not a case of first impression, but that the following pertinent part of Section 37 of the Judicial Code, 28 U. S. C. A., Section 80, and the decisions interpreting it, govern this situation:

> "If in any suit * * * removed from a state court to the District Court of the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been * * * removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

The Circuit Court of Appeals decided that this provision did not authorize your petitioner to remand these five cases when it appeared to him that there was in fact no federal jurisdiction, because the Supreme Court of Ohio had already decided that the case was properly removable on the ground of separable controversy, as the same appeared in plaintiffs' petitions. We agree that the decision of the Supreme Court of Ohio was *res judicata* on the question of removability, because that question can only be solved on a determination of the substantive law of the State of Ohio with respect to joint liability. But the Circuit Court of Appeals overlooked the fact that a federal district judge in remanding a case under the above statute does not decide that it was improperly removed, but merely that it has appeared at a later stage of the proceedings that there is in fact no basis for federal jurisdiction. Removability is determined from the petition and the petition for removal. But the right and duty to remand under the above statute contemplates a consideration of any and all facts which may later appear and which may show that in fact there is no basis for federal jurisdiction. The interpretation of the Circuit

Court of Appeals would entirely circumvent the plain language of this statute, and would prohibit a federal district judge from ever remanding a case; since, in every case removed to the Federal District Court from a state court, the court granting the removal must necessarily decide that it is properly removable. If this is conclusive of the question of federal jurisdiction, then the federal district judge could under no circumstances remand such a case. We submit that the above statute is incapable of such a construction.

The case of *McNutt vs. General Motors Acceptance Corporation of Indiana, Inc.*, 298 U. S. 178, laid down the rule that the above statute vests the District Court with authority to inquire of its own motion, at any time, whether the conditions of jurisdiction have been met, and in so doing the District Court is not bound by the pleadings of the parties. The decision of the Circuit Court of Appeals in the instant case is in conflict with this view. See also *Internat'l & G. N. R. R. vs. Hoyle,* (C. C. A. 5th, 1906) 149 Fed. 180.

It seems to go without saying that the decision of the Supreme Court of Ohio could be *res adjudicata* of nothing more than was there decided, namely, that the petition of the plaintiff, standing alone, showed the existence of a separable controversy. In its opinion, that court stated (134 O. S. 432, 440) that unfortunately it could not give consideration to the evidence adduced on the trial as to the knowledge of Armour & Company of the intended use of its Boston butts in the manufacture of metwurst. But when that fact appeared before the federal district judge, he was bound to remand the case under the above statute.

Point D. Where Plaintiff Is an Alien, No Separable Controversy Exists

Likewise, when it appeared that the plaintiff in *Kniess vs. Armour & Company* was an alien and not a citizen of any state, your petitioner was in duty bound under the above statute (28 U. S. C. A., Sec. 80) to remand the case to the state court for the reason that there is no basis for federal jurisdiction on the ground of separable controversy when the plaintiff is an alien.

Compania Minera y Compradora de Metales Mexicano, S. A., vs. American Metal Company, 262 Fed. 183.

Creagh vs. Equitable Life Assurance Society of United States, 88 Fed. 1.

See also, as dealing with alien defendants:

King vs. Cornell, 106 U. S. 395.

Merchants' Cotton Press & Storage Co. vs. Insurance Company of North America, 151 U. S. 368.

The latter case also held that a mere declaration of intention to become a citizen is insufficient, as such declaration does not make him a naturalized citizen within the meaning of the Removal Act.

The petition for removal in this case alleged that George Kniess was a citizen of the State of Ohio. After the case had been removed to the federal District Court, it appeared that said George Kniess was not a citizen of any state, but was an alien. We submit that this is precisely the kind of situation that the above statute was intended to cover. To require your petitioner to hear this case would extend federal jurisdiction to a situation

clearly not contemplated by the Acts of Congress relating to federal jurisdiction.

There are many cases where a federal district judge has remanded cases removed on the ground of diversity of citizenship when it appeared in the course of the trial that in fact there was no such diversity of citizenship. The same result should be reached when it appears that the plaintiff, in a case removed on the ground of separable controversy, is an alien and not a citizen of this country.

We respectfully submit that the decision of the Circuit Court of Appeals in this behalf is contrary both to the above quoted statute and the applicable decisions interpreting it.

Point E. That the Petitions for Removal in These Five Cases Were Insufficient to Warrant Removal on the Ground of Separable Controversy

As appears from the petition for removal, attached to the petition for writ of mandamus as Exhibit B (Record, p. 13), which is one of five identical petitions filed in the five cases, there is no allegation from which a separable controversy might be even inferred. The only statement made intimates that diversity of citizenship was the sole ground of removal.

But this court has held that where there is no separable controversy, and resident and non-resident defendants are joined, there is no right of removal.

Peper vs. Fordyce, 119 U. S. 469.

This court has held heretofore that the petition for removal itself should plead the facts showing a right in the petitioner to demand the removal.

IN THE

Supreme Court of the United States

October Term, 1939

No. [redacted] 65

FRANK L. KLOEB, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION,
Petitioner and Respondent Below,

vs.

ARMOUR & COMPANY, AN ILLINOIS CORPORATION,
Respondent and Petitioner Below.

REPLY BRIEF FOR PETITIONER

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Phoenix Insurance Co. vs. Pechner, 95 U. S. 183.
Crehore vs. Railway Co., 131 U. S. 240.

In *Chesapeake & Ohio Railroad vs. Cockrell*, 232 U. S. 146, this court adhered to the rule but limited the requirements of the petition for removal to the statement of facts not already appearing on the record.

It is respectfully suggested that this rule might be clarified so as to determine whether a petition for removal on the ground of a separable controversy is sufficient where the petition for removal makes no such claim, but the separable controversy is, or may be, inferred from the petition of the plaintiff. Had the Court of Common Pleas, in the five cases here under discussion, granted the respective petitions for removal without any consideration, we submit that it would have been a highly doubtful question to determine, on motion to remand, in the United States District Court, without any claim on the part of the removing defendant that a separable controversy actually existed.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of *certiorari* and thereafter reviewing and reversing said decision.

PERCY R. TAYLOR,
NOLAN BOGGS,
Counsel for Petitioner.

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